UNITED STATES
v.
ANNIE BENNETT

IBLA 85-98 Decided June 11, 1986

Appeal from a decision of Administrative Law Judge Michael L. Morehouse, denying Native allotment application AA-7017.

Affirmed.

1. Alaska: Native Allotments

A Native allotment application filed pursuant to sec. 1 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 (1970), is properly denied where the applicant fails to establish her independent use and occupancy as a minor child prior to withdrawal of the claimed land.

APPEARANCES: Tred Eyerly, Esq., Anchorage, Alaska, for appellant;
Bruce E. Schultheis, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Annie Bennett has appealed from a decision of Administrative Law Judge Michael L. Morehouse, dated September 13, 1984, denying her Native allotment application AA-7017.

On December 13, 1971, appellant filed a Native allotment application for a tract of land "on the East shore of the Salt Lake on Admiralty Island" described as the W 1/2 NE 1/4, fractional E 1/2 NW 1/4 sec. 4, T. 50 S., R. 69 E., Copper River Meridian, Alaska, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (the Act). 1/ Appellant claimed use and occupancy of the land from 1900 in the form of hunting, fishing, berrypicking, and plant gathering and stated that at one time a cabin had been on the land.

On November 24, 1982, the Alaska State Office, Bureau of Land Management (BLM), issued a contest complaint, essentially charging that appellant had failed to engage in independent use and occupancy of the tract of land sought in her allotment application prior to withdrawal of the land by

1/ The Act was repealed by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1982), subject to applications pending on Dec. 18, 1971.

Presidential Proclamation dated February 16, 1909 (35 Stat. 2226 (1909)), which incorporated the land into the Tongass National Forest. 2/ The complaint was issued pursuant to the Board's direction in Andrew Gordon McKinley (On Reconsideration), 61 IBLA 282 (1982). A timely answer was filed and a hearing was held before Judge Morehouse on November 18, 1983, in Juneau, Alaska.

In his September 1984 decision, Judge Morehouse denied appellant's allotment application because she failed to demonstrate that "as a minor she independently substantially used and occupied the claimed land to the potential exclusion of others" prior to the 1909 withdrawal. 3/ Judge Morehouse noted that it was unclear what parcel of land appellant is claiming, i.e., the "family camp" or the land across Hasselborg Creek from the camp, but found that in either case she did not meet the requirements of the Act.

[1] Section 3 of the Act, 43 U.S.C. § 270-3 (1970), requires that in order to be entitled to an allotment of up to 160 acres of land, an applicant must make satisfactory proof of "substantially continuous use and occupancy of the land for a period of five years." 4/ See 43 CFR 2561.2. The term "substantially continuous use and occupancy" is defined in 43 CFR 2561.0-5(a) as follows:

> The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

We have long held the "substantial use and occupancy contemplated by the Act must be by the Native as an independent citizen for himself or as head of a family, and not as a minor child occupying or using the land in the company of his parents. Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974)." Andrew Gordon McKinley (On Reconsideration), supra at 285. Moreover, where the land has been withdrawn, an allotment applicant must establish that his use and occupancy commenced prior to the withdrawal. Id.

In adjudicating appellant's allotment application, Judge Morehouse invoked the standard of independent use and occupancy enunciated in Nelson. In her statement of reasons for appeal, appellant takes exception to this

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2/ Because the land was not "unreserved on December 13, 1968," appellant's Native allotment application was not legislatively approved pursuant to section 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1982).

3/ Appellant was born on May 10, 1897, and was, therefore, almost 12 years old at the time of the 1909 withdrawal of the land.

4/ This statutory requirement was added by section (e) of the Act of Aug. 2, 1956, 70 Stat. 954 (1956).

standard, contending that neither the Act nor its implementing regulations preclude a minor who has engaged in use and occupancy of land "in the company of her parents" from being entitled to an allotment of that land. Appellant argues her interpretation is more in accordance with the purposes of the Act which recognized the Native pattern of familial use of land; the principle that statutes passed for the benefit of Indians should be liberally construed in their favor. See Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979); and early Departmental interpretations of the statutory requirement of "substantially continuous use and occupancy." 5/

We conclude that the long-standing Departmental interpretation of the Act and its implementing regulations, to the effect that an allotment applicant must have engaged in independent use and occupancy, fully comports with the purposes of the Act in recognizing the Native pattern of familial use of land. Appellant's interpretation could result in the granting of separate 160-acre allotments to each child of the same family, even though the children only used and occupied the land alongside their parents as dependent minors. This was clearly not the purpose of the Act. As Judge Burski said in his concurring opinion in Andrew Petla, 43 IBLA 186, 200 (1979): "The entire focus of the Allotment Acts, regardless of their wisdom, was to 'civilize' the Native inhabitants by breaking up the traditional communal society through individual allotments which would be utilized as homesteads." Further, it is evident that at certain ages an allotment applicant cannot be said to be capable of engaging in the use and occupancy required by statute. 6/ That use and occupancy is described as follows:

> [P]ermissive Native occupation * * * was required to be "notorious, exclusive and continuous, and of such a nature as to leave visible evidence thereof so as to put strangers upon notice that the land is in the use or occupancy of another, and the apparent extent thereof must be reasonably apparent." United States v. 10.95 Acres of Land in Juneau, 75 F. Supp. 841, 844 (D. Alaska 1948). See also United States v. State of Alaska, 201 F. Supp. 796 (D. Alaska 1962); Kittie Cleogeuh, 28 L.D. 427 (1899); A. S. Wadleigh, 13 L.D. 120 (1891).

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5/ Appellant refers to BLM's approval of three Native allotment applications, dated May 12, 1961 (Mary S. Gray), Mar. 23, 1961 (Frank Kitka), and Aug. 24, 1961 (Charles G. Benson), where the question of whether the applicant was independently using and occupying his or her land prior to withdrawal of the land was not addressed, even in the face of evidence that the applicants were "using their land in conjunction with their parents and not as independent citizens." These decisions are unpublished and have little precedential value. Shields v. United States, 698 F.2d 987, 990 (9th Cir. 1983), cert. denied, 104 S. Ct. 73 (1983). The fact that BLM may have incorrectly approved these applications does not justify repeating the error in this case. George R. Schultz, 85 IBLA 77, 88 (1985); T.E.T. Partnership, 84 IBLA 10, 15 (1984); George Brennan, Jr., 1 IBLA 4, 6 (1970).

6/ In Floyd L. Anderson, Sr., 41 IBLA 280, 283, 86 I.D. 345, 347 (1979), we held, as a "matter of law," that a child of 5 years of age is too young to engage in substantial use and occupancy.

United States v. Flynn, 53 IBLA 208, 227, 88 I.D. 373, 383-84 (1981). Moreover, the use and occupancy must be personal use and occupancy by the Native applicant. Shields v. United States, supra. As we said in Andrew Petla, supra at 193:

> It would defy reason to hold that a child of 11 or 12 visiting public land in company with his parents or other relatives for the first or second time is capable of and, solely by virtue of his presence, is in fact, laying personal and independent claim of entitlement to the land and thus is invested with dominion over it to the potential exclusion of others. We hold that as a matter of law he could not have done so.

Also, a minor child who is using and occupying land in the company of his or her parents or siblings cannot be said to be engaging in use and occupancy "at least potentially exclusive of others," as required by 43 CFR 2561.0-5(a). As we stated in Susie Ondola, 17 IBLA 359, 361 (1974), appeal dismissed, Ondola v. Hathaway, Civ. No. A75-111 (D. Alaska May 30, 1980), a minor child must exert "independent control and use of land to the exclusion of her parents, siblings and others." We therefore reaffirm the standard of independent use and occupancy. State of Alaska, 85 IBLA 196, 202-03 (1985); Sarah F. Lindgren, 23 IBLA 174 (1975).

Before we consider whether appellant has fully complied with the statutory requirement of use and occupancy, we address the question of what land appellant is claiming because, as noted by Judge Morehouse, some doubt exists in the record. Appellant's allotment application describes a parcel of land by reference to a location on a survey plat and by the description "on the East shore of the Salt Lake on Admiralty Island." An attached map indicating the surveyed sec. 4, T. 50 S., R. 69 E., Copper River Meridian, Alaska, bears an outline of the claimed land. On appeal, counsel for appellant represents that the allotment appellant applied for is "located across Hasselborg Creek from where the family living area was" (Statement of Reasons at 18; see Tr. 40, 41). The record indicates the "family living area" is a small parcel of land in the northwestern corner of sec. 4, T. 50 S., R. 69 E., Copper River Meridian, Alaska, on the north shore of the Salt Lake. See Exh. R-1. In concluding it was unclear which land appellant is claiming, Judge Morehouse cited the following evidence at pages 4 and 5 of his decision:

> On Mrs. Bennett's application, she cites a cabin as being an improvement on the land applied for, as well claiming that she lived on the land from 1900 - 1920. Thus the application describes the family camp, not the area across the creek. (Ex. No. G-3). Additionally, both Mrs. Bennett's affidavit (Ex. No. G-2) and George Davis' affidavit (Ex. No. G-1) mention the "family" land, while Mrs. Bennett's affidavit again mentions the cabin. Finally, Mrs. Bennett's diagram, which was drawn during the hearing to show the land for which she has applied, also included a crude sketch of a cabin. (Ex. No. R-6). While it is true that Mrs. Bennett is illiterate in the English language and cannot read a map (Tr. 66), this does not clear up the confusion.

> If, in fact, it is the family land for which Mrs. Bennett has applied, the application must be denied since she did not independently use and occupy that land.

In addition to the above evidence, appellant states she "was born in 1897 on the land I am claiming" (Exh. G-2) and "[l]ived there year around" from 1900 to 1920 (Exh. G-3). On appeal, counsel for appellant argues "it was difficult at the hearing for Mrs. Bennett to express exactly what land she had used and occupied" and states "it is probable she considers her allotment to include the area where the family cabin was located" (Statement of Reasons at 18, 22). We are reluctant to deal in probabilities to determine what land is being claimed. However, since Judge Morehouse felt the circumstances warranted giving appellant the benefit of the doubt on this issue, we will proceed to determine whether she met the use and occupancy requirements as to the land described in her allotment application. Judge Morehouse found appellant did not meet such use and occupancy requirements for the following reasons:

> [G]iving Mrs. Bennett the benefit of doubt and assuming she does in fact want the land across Hasselborg Creek as her allotment, she still has failed to present clear and credible evidence that she used the land as an independent citizen, and to the potential exclusion of others, prior to the 1909 withdrawal of the land which created the Tongass National Forest.
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> Mrs. Bennett did testify that "[s]he went berry picking with her sister and her friends . . . [a]nd Mrs. Johnson" across the river. (Tr. 65). However, Mrs. Bennett does not recall in what year she began crossing the river. This is not clear and credible proof. There are no witnesses to support the claim, and it is very possible that she began her use after the 1909 withdrawal. Even if she started using the land prior to 1909, her use could not be termed potentially exclusive; she went to the land with several other people, all of whom, in the [Tlingit] culture, "owned" the land. (Tr. 82). Viewing all the evidence in the best light to benefit Mrs. Bennett, it is still clear that she has not met the statutory requirements.

(Decision at 5).

On appeal, appellant makes several arguments in support of her assertion that, prior to the 1909 withdrawal, she used the land as an independent citizen and to the potential exclusion of others. These arguments, however, do not persuade us that Judge Morehouse's decision should be reversed. Appellant asserts, based upon her testimony and that of social anthropologist Worl, that "she demonstrated that she began independent use of her land prior to 1909 withdrawal" (Statement of Reasons at 22). Appellant was unable to recall when she commenced her use and no other evidence in the record substantiates a commencement date. We agree that appellant's testimony that she used the land as a "young girl" (Tr. 65) could mean, based upon Tlingit standards of maturity, that such use commenced prior to the 1909 withdrawal. Such

evidence, however, does not clearly demonstrate appellant did in fact use the land prior to the 1909 withdrawal. Even if such use was demonstrated, appellant's application should be denied on other grounds. Appellant argues she used her land to the potential exclusion of others because she used the land without parental supervision and "though others accompanied her, they recognized the land as Mrs. Bennett's" (Statement of Reasons at 24). Appellant testified that she went berrypicking on the land with her sister, friends, and Mrs. Johnson, and that this activity was without parental supervision (Tr. 65). However, appellant still does not demonstrate her use was that of an independent citizen for herself and potentially exclusive of others.

> As we stated in Natalia Wassilliey, 17 IBLA 348, 350 (1974):
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> [The applicant's] assertion carefully refrains from stating that she used and occupied her land for herself prior to 1961. If she used the land alongside her parents or siblings, entitlement to allotment would not be demonstrated because "use and occupancy must be substantial, actual possession and use of the land at least potentially exclusive of others and not merely intermittent use." 43 CFR 2561.0-5 * * *. [Emphasis in original.]

In this case, appellant clearly used the land with her sister, friends, and Mrs. Johnson. Appellant's assertion that those who accompanied Mrs. Bennett recognized the land as hers is unsupported by the record.

Appellant has the ultimate burden of proving compliance with the statutory requirements for a Native allotment. Pedro Bay Corp., 88 IBLA 349, 354 (1985). Compliance with the use and occupancy requirements must be shown by clear and credible evidence. United States v. Flynn, supra at 244, 88 I.D. at 393. We conclude appellant has not shown by clear and credible evidence that as a minor she used the land as an independent citizen to the potential exclusion of others prior to withdrawal of the land in 1909.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge